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In the Supreme Court of the United States

OCTOBER TERM, 1980

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that the employees at petitioner's Charlotte, North Carolina plant had been merged into an existing multiplant unit of petitioner's Union-represented employees, and that therefore petitioner violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the Union [1] as the Charlotte employees' representative on the ground that the Board previously had erred in refusing to conduct a decertification election restricted to the Charlotte plant.

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[1] International Union of Electrical, Radio and Machine Workers (hereinafter the "Union").

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–3a) is not reported. The decision and order of the Board (Pet. App. 15a–28a) are reported at 238 N.L.R.B. No. 102. The Board's supplemental decision and order (Pet. App. 29a–37a) are reported at 240 N.L.R.B. No. 106. The Board's decision and order in the underlying representation proceeding (Pet. App. 6a–14a) are reported at 227 N.L.R.B. 1932.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1980. A timely petition for rehearing and suggestion for rehearing en banc was denied on May 19, 1980. The petition for a writ of certiorari was filed on August 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. App. 38–41).

STATEMENT

1. Petitioner operates facilities throughout the country, including an apparatus repair plant located in Charlotte, North Carolina (Pet. App. 20a). Since 1950 the Union has, through Board certifications issued to it and its constituent locals on a plant-by-plant basis, become the bargaining representative for petitioner's employees at various plants, including the one in Charlotte (Pet. App. 7a). The Union has also, since 1950, negotiated with petitioner a national collective bargaining agreement (and a series of supplemental agreements extending and modifying the national agreement) applicable to all employees represented by the Union at the various plants (Pet. App. 7a–8a).[2] The national agree-

[2] The national agreement covers in detail such substantive terms as general wage increases, cost-of-living adjustments, overtime pay, night-time adjustments, holidays, vacations, sick and personal days, leaves of absence, terminations, procedures for increasing and decreasing the workforce, a four-stage

(Continued)

ment provides for the negotiation of local supplemental agreements to cover bargaining issues local in nature and to implement certain of the general provisions of the national agreement. However, local supplements may not conflict with the national agreement and are subject to review by a Conference Board composed of representatives from the Union's various locals (Pet App. 8a–9a, 12a). The national agreement specifies how local supplements may be modified and provides for the continuation of all outstanding local agreements not voided by the national agreement upon each extension of the term of the national agreement (Pet. App. 31a, 33a; A. 248; B. 109, 167). The national agreement also prescribes a procedure by which local bargaining units certified after its ratification may be included in and covered by its terms (Pet. App. 9a–10a).[3] Invariably, newly certified local bargaining units have taken advantage of this provision and have been brought under the national agreement's coverage (Pet. App. 12a).[4]

In early 1975, the Union initiated an organizational campaign at petitioner's Charlotte plant. Coverage by the national agreement was a key element of the campaign, and copies of the agreement were widely distributed among the Charlotte employees (Pet. App. 13a). On March 21, 1975, pursuant to a Board-conducted election in a unit stipulated

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grievance procedure, arbitration, hours of work, strike and walkout provisions, union shop provisions, and general seniority rules (Pet. App. 9a; B. 23–47). ("A." references are to the joint appendix in the court of appeals. "B." references are to the exhibit volume of the joint appendix.)

[3] The relevant provision states (Pet. App. 9a–10a): "Any units for which the Union or any of its Locals shall be lawfully certified by the National Labor Relations Board as the exclusive bargaining representative, shall, upon assent in writing to this Agreement by such representative, be included in and covered by this Agreement as of the date of certification, except that either party may withhold the application of those portions of this Agreement considered inapplicable to such units by giving written notice to the other party within thirty (30) days of such representatives' assent."

[4] None of these units has ever been subsequently excluded from the agreement's coverage for any reason other than petitioner's sale or discontinuance of operations at a particular plant site. (A. 209–211, 399–400, 464–465, 482).

as appropriate by the parties, the Union was certified as bargaining agent for all production and maintenance employees at the Charlotte plant (Pet. App. 7a, 21a). Four days later, the chairman and secretary of the Union's Conference Board assented to application of the national agreement to the employees in the Charlotte unit retroactive to the date of certification. By letter dated April 2, 1975, petitioner acknowledged the Union's assent (Pet. App. 7a, 21a).[5] On July 20, 1976, petitioner and the Union executed a supplemental agreement continuing until July 16, 1979 the national agreement as modified (Pet. App. 21a), and expressly providing that all local supplements previously negotiated would continue in full force and effect until that date (Pet. App. 33a; B. 109, 167).[6]

On May 5, 1976, an employee at petitioner's Charlotte plant filed a petition with the Board seeking decertification of the Union's local as the representative of the Charlotte employees (Pet. App. 7a, 22a). Following a hearing on the petition, the case was transferred from the hearing officer to the Board for decision (Pet. App. 6a). On January 31, 1977, the Board issued a decision and order dismissing the petition on the ground that it sought decertification in a unit which was inappropriate in that it was "not coextensive with the currently recognized and established bargaining unit" (Pet. App. 14a). The Board based its decision on its findings that there exists "a controlling history of multiplant bargaining resulting in the establishment of a single multiplant unit embracing all those plants of [petitioner] in which the Union through its Conference Board has been rec-

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[5] Subsequently, local supplements applicable to the Charlotte plant were negotiated covering such matters as wage rate progressions for new employees, shift hours, the composition of the local bargaining committee, the recognized bargaining unit, and procedures for implementing the national agreement's provisions on overtime, grievances, seniority and hours scheduled at the local plant (Pet. App. 10a; B. 1-2).

[6] In addition, the appendix to the national agreement was amended to include the Charlotte plant in the list of plants covered by the agreement (B. 170).

ognized as the exclusive bargaining agent" (Pet. App. 13a), and that the Union's local at the Charlotte plant had not "retained a sufficiently separate, independent bargaining position from the other locals comprising the Conference Board in matters of collective bargaining for the employees at the Charlotte [plant] to be considered a separate unit." (Pet. App. 11a.)[7] While recognizing that as of the date on which the decertification petition was filed the Charlotte unit had been certified only 14 months, the Board concluded that this fact did not preclude a finding of merger (Pet. App. 13a):

> At the hearing, there was uncontradicted evidence that copies of the national agreement were widely distributed prior to the representation election and that the coverage of the Charlotte employees was a key element of the representation campaign. There is no evidence that the Charlotte unit resisted in any way its amalgamation with the other groups [of] employees. While *General Electric Company,* [180 N.L. R.B. 1094 (1970),] did not indicate the length of the bargaining history of the individual unit there involved, other Board decisions have found that merg-

[7] The Board further explained (Pet. App. 12a): "[I]t is clear that the Westinghouse Conference Board is the preeminent collective-bargaining agent for all employees represented by the Union at Westinghouse. Each local is represented on the board, but all decisions are rendered collectively. The record reveals that it is the Union's officers and not local agents who make the decision whether to include newly certified local units and that the decision has uniformly been in favor of adding newly certified units. The national agreement itself states that no local supplements may conflict with it and that the agreement covers all company-wide terms. It is evident that the parties also may place in the agreement terms that vary in their application to individual plants. For example, in the 1976–79 national agreement, a term was added providing for a special skills increase that varied greatly in its application to different plants. It therefore is evident that the national agreement is not limited in the scope of its application, and [may] contain terms both national in scope and those of only local consequence. Such an agreement [is] not 'merely a basic agreement for convenience in bargaining for whatever local units may be represented by the Union.' *Radio Corporation of America,* 121 NLRB 633, 644 (1958)."

ers of separate bargaining units have occurred as a result of multiplant agreements in time-spans of little more than a year. *Gould-National Batteries, Inc.*, 150 NLRB 418 (1964); *Owens-Illinois Glass Company*, 108 NLRB 947 (1954). We are therefore of the opinion that the employees of the Charlotte unit had sufficient notice that the unit's inclusion within the national agreement would entail a merger with a multiplant unit.[8]

2. In January and February of 1978, the Union filed unfair labor practices charges alleging that following the dismissal of the certification petition, petitioner violated Sections 8(a)(5)and (1) of the National Labor Relations Act by refusing to bargain with the Union as the representative of the Charlotte employees and by establishing unilaterally a second-shift operation among unit employees at the Charlotte plant (Pet. App. 15a–16a).[9] A complaint issued, and on September 29, 1978 the Board, finding that petitioner's refusal to bargain violated Sections 8(a)(5) and (1), granted summary judgment to the Union (Pet. App. 17a)[10] and issued a bargaining order (Pet. App. 24a–26a). On February 13, 1979, the Board issued a supplemental decision and order, finding that petitioner violated Sections 8(a)(5) and (1) by establishing a second-shift operation at the Charlotte plant without notice to or consultation with the Union (Pet. App. 33a–34a), and directing petitioner to restore the former

[8] The Board also found (Pet. App. 12a–13a) that neither the fact that the national agreement referred to plant-level employee organizations as "units" nor the agreement's general provision for local supplements was inconsistent with a finding of multiplant bargaining. See *Atlantic Richfield Co.*, 208 N.L.R.B. 142, 144 (1974); *General Electric Co.*, 180 N.L.R.B. at 1095 n.6.

[9] One of the local supplements applicable to the Charlotte plant, continued in force by the 1976–1979 extension of the national agreement, provides in pertinent part: "New shifts and changes in existing shift schedules will not be made effective without prior discussion with the Local" (B. 13).

[10] In its decision, the Board also found (Pet. App. 17a) that a material issue of fact existed with respect to the allegation that petitioner violated Sections 8(a)(5) of the Act by establishing unilaterally a second-shift operation, and therefore remanded that issue for a hearing.

shift schedule upon request, to reimburse employees for any losses suffered, and to honor and apply the terms of the national agreement and applicable local supplements (Pet. App. 34a–35a).

3. In a per curiam opinion, the court of appeals affirmed the Board's finding that the employees at petitioner's Charlotte plant had been merged into a single multiplant unit, rejected petitioner's assertion that it was improper for the Board to refuse to conduct a decertification election restricted to the Charlotte unit, and accordingly enforced the Board's order (Pet. App. 1a–3a).

ARGUMENT

Petitioner defends its refusal to bargain by urging that the Board improperly refused to hold a decertification election restricted to the unit employees at its Charlotte plant. There is no merit to that contention. In refusing to hold the certification election, the Board applied established principles of law to a unique set of facts. The decision of the court of appeals upholding the Board is consistent with the decisions of this Court and does not conflict with any decision in another circuit. Further review, therefore, is unwarranted.

1. The Board has for a quarter-century applied the following rule in determining whether to direct a decertification election (*Brom Machine & Foundry Co.* v. *NLRB*, 569 F. 2d 1042, 1043 (8th Cir. 1978), quoting with approval, *Continental Can Co.*, 217 N.L.R.B. 316, 317 (1975)):

> [I]n decertification cases the appropriate unit in which to conduct an election is the certified *or* contract unit. If the certified unit has been changed by contract, the Board relies upon the unit recognized by collective bargaining and on that basis holds an election to determine whether the employees wish to continue being represented.

Accord, *Campbell Soup Co.*, 111 N.L.R.B. 234, 235 (1955). It also is well settled that "parties to a collective-bargaining

relationship may, by contract, bargaining history, and course of conduct, merge existing certified units into multiplant appropriate units." By such merger, the separate identity of each component unit is lost and a single larger bargaining entity is established. *White-Westinghouse Corp.*, 229 N.L.R.B. 667, 672 (1977), enforced *sub. nom. I.U.E.* v. *NLRB*, 604 F. 2d 689 (D.C. Cir. 1979). Accord: *General Electric Co.*, 180 N.L.R.B. 1094, 1095 (1970); *Gould-National Batteries, Inc.*, 150 N.L.R.B. 418, 420, & n. 8 (1964). Therefore, when considering a decertification petition filed by employees in a multiplant unit formed by such a merger, the Board follows the rule that where "a separate unit covered by a Board certification [has] by an effective bargaining history be[en] merged into a broader unit * * * only the broader historical unit is appropriate for decertification purposes." *Gould-National Batteries, Inc., supra*, 150 N.L.R.B. at 420, and cases cited therein.

2. Petitioner is misdirected in challenging the merger finding on the basis that the Board did not find the multiplant unit "appropriate" for bargaining (Pet. 2, 12–15, 17 n. 10, 18, 20–21). True, the Board did not, in its decision, directly address such customary indicia of appropriateness as proximity of plants, integration of functions, and common management. Instead, it found the parties' bargaining history dispositive—by negotiating a succession of multiplant contracts over 25 years the parties had created a strong "community of interest" among employees who had come to share a broad range of contractually defined terms and conditions of employment negotiated on a group basis (Pet. App. 8a–14a). See *White-Westinghouse Corp., supra*, 229 N.L.R.B. at 674 ("[a]ny prior differences, including geographical separation and lack of interchange of employees—matters sometimes relevant in determining *ab initio* unit appropriateness—are rendered considerably less significant by this common history"); *General Electric Co., supra*, 180 N.L.R.B. at 1095 n.6 ("[w]e are * * * not disturbed by the lumping together of several groups of employees with different occupations for the reason that the lengthy

bargaining history * * * shows that in fact the present grouping is a basis for collective bargaining and that whatever separate community of interest * * * may have existed prior to this history of bargaining is today of little importance"). Thus, petitioner's reliance (Pet. 21) on factors such as the lack of geographical, functional and divisional integration of the unit employees misses the point,[11] for in the "merger" situation bargaining history may properly be found to outweigh other indicia of appropriateness.[12]

3. Nor is there merit to petitioner's contention (Pet. 3, 15, 17–23) that the Board's decision deprived the Charlotte employees of their Section 7 right to refrain from union activity. The employees were given an opportunity to accept or reject union representation—and consequent merger into the existing multiplant contractual unit—when they participated in the Board-conducted election that preceded the certification at Charlotte.[13] There was no evidence that the Charlotte employees objected to or resisted in any way their

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[11] *Hygrade Food Products Corp.*, 85 N.L.R.B. 841 (1949), on which petitioner relies (Pet. 18), is not to the contrary. There, the Board found that the bargaining history reflected in the record did not support a conclusion that the parties intended to establish a multiplant unit. *Id.* at 844–846. Moreover, to the extent that *Hygrade* required an express commitment by the parties to establish a multiplant unit, it was effectively limited in *White-Westinghouse Corp., supra*, 229 N.L.R.B. at 672. And see *General Electric Co., supra*, 180 N.L.R.B. at 1095 n.6

[12] Since the Board provided a thorough and detailed explanation of how the parties' bargaining history established the appropriateness of the multiplant unit for collective bargaining purposes (Pet. App. 7a–12a), there is no merit to petitioner's assertion (Pet. 4, 12, 14) that the Board failed to articulate properly the basis for its determination, in violation of this Court's decision in *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965). Similarly, petitioner's argument (Pet. 12, 16–17) that the court of appeals failed to review properly the Board's findings must also be rejected; the court adequately discharged its function when it concluded that there was substantial evidence in the record as a whole to support the Board's finding that the Charlotte unit was merged into the multi-plant unit (Pet. App. 3a).

[13] Petitioner's assertion (Pet. 7 & n.3, 23 & n.15) that the Charlotte employees were led to believe that they could decertify after one year is not supported by the record. The employee testimony (A. 173, 182, 189, 224)

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amalgamation with the other employees covered by the multiplant agreement. In these circumstances, the Board properly concluded that by electing Union representation and acquiescing in coverage by the pre-existing multiplant agreement, the employees indicated their desire to be included in the existing multiplant unit covered by the contract. *Lever Brothers Co.*, 96 N.L.R.B. 448, 450 (1951); *Owens-Illinois Glass Co.*, 108 N.L.R.B. 947, 949–950 (1954).[14]

Nothing in the Act compels the Board to hold a decertification election upon request for every employee unit it has ever certified, regardless of intervening events. The Act's mandate to assure employees "the fullest freedom" in exercising their statutory rights (29 U.S.C. 159(b)) is not an absolute. Rather, it is qualified by other—and sometimes conflicting—statutory policies including the promotion of stability in bargaining relations. See, *e.g.*, *Brooks* v. *NLRB*, 348 U.S. 96 (1954) (employees' uncoerced change of heart during the election year neither requires Board to hold a new election nor authorizes employer to withhold recognition). And see *Westinghouse Electric Corp.*, 115 N.L.R.B. 530, 532 (1956); *Campbell Soup Co.*, *supra*, 111 N.L.R.B. at 235.

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relied upon by petitioner (Pet. 7) reveals that they had the "impression" or "understanding" that they could "get out" of the Union later if they desired. On the other hand, the Union's chief organizer testified that he never discussed decertification possibilities with the employees (A. 596–599, 601–603). The Board made no finding on this issue, but did find (Pet. App. 13a) that the Charlotte employees had sufficient notice that they would be merged into the multiplant unit when they were brought under the coverage of the national agreement. Thus, the Charlotte employees should have been aware that by voting for representation by the Union and eventual merger into the multiplant unit, they would thereafter lose their right to decertify a unit limited to the Charlotte plant.

[14] In *Duke Power Co.*, 191 N.L.R.B. 308, 312 (1971), which petitioner cites with favor (Pet. 20 n.12), the Board found that steam plant employees were not given the option to choose whether to be associated in the larger unit. Here, however, the Board found that the organizing campaign clearly apprised Charlotte employees that such an amalgamation would result from a vote for representation by the Union.

The rule under which the Charlotte employees lost the right to decertify their own unit once they were merged into the multiplant unit simply recognizes the equities of the situation, and the fact that the Charlotte employees' rights were not the only ones at stake. By merging into the multiplant unit, the Charlotte employees gained benefits bargained for over the years by the Union as the agent of the multiplant unit. Since the Charlotte unit's departure from the multiplant unit would have tended to weaken, pro tanto, the larger unit, the Board was entitled to give substantial weight to the right of the majority to be protected from such fragmentation. To permit subgroups to break up an appropriate unit, established and maintained pursuant to the Act, "would be adding destabilizing confusion rather than bringing stability to the situation" and would render responsible collective bargaining next to impossible. *Standard Brands, Inc., Fleischmann Mfg. Division,* 214 N.L.R.B. 72, 74 (1973).

Contrary to petitioner's repeated assertions (Pet. 2–4, 9, 12, 17 n.11), it does not follow from the Board's decision that the Charlotte employees are permanently "locked in" to the multiplant unit. Petitioner may file a unit clarification petition with the Board and, if the Board finds that the preferences of the employees or an employee subgroup are relevant, an election incident to that determination may be ordered. *Libby-Owens-Ford Glass Co.,* 169 N.L.R.B. 126, 128 (1968). And see *White-Westinghouse Corp., supra,* 229 N.L.R.B. at 676; *I.U.E.* v. *NLRB,* 604 F. 2d 689, 696 n. 20 (D.C. Cir. 1979) ("if multiplant bargaining proves unduly burdensome, the Company and the Union may negotiate for unit alteration. If a satisfactory resolution cannot be reached, either party may petition the Board to change the unit").[15]

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[15] Moreover, just as the Act permits the parties to agree to the merger of individual units, it permits them to divide a recognized unit into appropriate independent units by subsequent bargaining history. *St. Regis Paper Co.,* 101 N.L.R.B. 656, 658 (1952).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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